

April 3, 2013

Carlyn M. Drivdahl
Deputy County Counsel
Tuolumne County
2 South Green Street
Sonora, CA 95370

Re: Your Request for Advice
Our File No. A-13-033

Dear Ms. Drivdahl:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that because the Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. We also note that our advice is based solely on the provisions of the Act.

QUESTIONS

1. Does Supervisor Sherri Brennan have a potential conflict of interest prohibiting her from making, participating in making, or otherwise influencing governmental decisions regarding proposed amendments to the Agricultural Resources Element (“Ag Element”) of Tuolumne County’s General Plan that would make parcels of land, including the supervisor’s, more readily developable, despite the property being currently subject to a Williamson Act contract?
2. If Supervisor Brennan has a disqualifying conflict of interest in a particular decision, can the remaining decisions concerning the Ag Element be bifurcated allowing her to take action on them?
3. If Supervisor Brennan has a conflict of interest in a particular decision, may she speak to the Board as a member of the public about the effects of the amendments on her real property?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Yes. The proposed amendment to Policy 11.A.2 of the Ag Element would allow smaller parcels of land, such as the one owned by Supervisor Brennan, to be more readily developed. Notwithstanding the fact that it is currently subject to a Williamson Act contract, such potential for development would increase the value of her real property, and therefore have a reasonably foreseeable financial effect on it.
2. Even though Supervisor Brennan has a conflict of interest in the decision concerning a revision to Policy 11.A.2, the remaining proposed revisions to the Ag Element can be segmented so that Supervisor Brennan can vote on them if they are not inextricably interrelated with the decision in which she has a conflict of interest, as discussed below.
3. Supervisor Brennan may speak as a member of the public so long as she complies with the rules located in Regulation 18702.5(b)(1) and (b)(2).

FACTS

You are Deputy County Counsel for the County of Tuolumne requesting advice on behalf of Supervisor Brennan concerning a potential conflict of interest involving real property she owns within the County.

According to your letter, the Board of Supervisors will consider whether to adopt various revisions to the Ag Element (Chapter 11) of Tuolumne County General Plan. The purpose of the Ag Element is (1) “to establish policies and implementation programs to promote the stability and productivity of the County’s agricultural lands and industries;” (2) to provide clear guidelines for decisions in agricultural areas; and (3) to express policies that promote and protect the current and future needs of the agricultural industry.

Goal 11.A of the Ag Element seeks to “limit intrusion of new development into agricultural areas by avoiding the conversion of agricultural lands to residential, nonagricultural commercial, or industrial uses except those uses that are determined to be agricultural support.” Currently, the County evaluates land development applications proposed on or adjacent to agricultural land through use of the Agricultural Rating System matrix as directed by Implementation Program 11.A.e.

The intent of the matrix is to identify agricultural properties that should be conserved for agricultural use and those that could be developed. Smaller agricultural parcels close to existing nonagricultural development should receive lower ratings that would indicate they are appropriate for development. However, practice has indicated that this is not always the case in that the matrix has rated many smaller agricultural parcels adjacent to existing nonagricultural development as Agricultural Land of Local Importance or High Value Agricultural Land.

You state that the current rating system has resulted in high ratings for these smaller parcels, such as Supervisor Brennan's property (rated Agricultural Land of Local Importance), thus reducing their development potential. Your facts suggest that certain proposed changes to the Ag Element will have a favorable impact on the potential for these smaller parcels of land to be developed.

To begin, Goal 11.A would be revised to read: "Avoid the conversion of agricultural lands except those determined to be infill areas." Next, revisions to Policy 11.A.1 are proposed to avoid the conversion of agricultural land. Finally, proposed Policy 11.A.2 would exempt infill parcels and smaller agricultural parcels located adjacent to urban land use designations and within proximity of a public water main. This last revision, in particular, will directly affect approximately 2,476 acres of agricultural land in Tuolumne County, including Supervisor Brennan's property.

In our telephone conversation of March 27, 2013, you confirmed that Supervisor Brennan owns at least one parcel of land that would be directly affected by the proposed revision to Policy 11.A.2 in that it would qualify as an infill parcel or smaller agricultural parcel exempt from the prohibition against conversion of agricultural land. In other words, it would become a parcel that has development potential, and thus more valuable.

With respect to Supervisor Brennan's property, your letter states it is currently subject to a Williamson Act contract that has a rolling 10-year term, and that no notice of nonrenewal is in effect. Your facts point out that land subject to a Williamson Act contract cannot be converted from an agricultural use to nonagricultural development. It is your understanding that if a notice of nonrenewal is filed, the restriction against development will remain in effect for 10 years from the time the notice is provided.

You also advised that the Board of Supervisors will deal with other proposed revisions to the Ag Element in addition to the three described in your letter. However, you do not believe that they are so interrelated to Policy 11.A.2 such that Supervisor Brennan would be unable to vote on them.

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a

“conflict of interest” in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

As a member of the Board of Supervisors for Tuolumne County who would be called upon to vote on proposed revisions to the Ag Element in the County’s General Plan, Supervisor Brennan is a public official who would be making a governmental decision.² She would therefore meet steps one and two.

Step Three: What are Supervisor Brennan’s economic interests?

Of the economic interests recognized under the Act, those interests implicated by your account of the facts are the following:

Real Property – A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2).

According to your letter, Supervisor Brennan owns a parcel of land within the area that will be affected by the proposed revisions to the Ag Element of the County’s General Plan. Assuming her interest in the parcel of property has a value in excess of \$2,000, Supervisor Brennan has an economic interest in this property.

Step Four: Is the economic interest directly or indirectly involved in the governmental decision?

“In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704(a).) For governmental decisions that affect real property interests, the standards set forth in regulation 18704.2 apply. (Regulation 18704(a)(2).)

Real property in which a public official has an economic interest is directly involved in a governmental decision if it is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

² Please note, if a public official has a conflict of interest in an agenda item noticed at a public meeting, then he or she must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse himself or herself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter. (Section 87105.) However, since Supervisor Brennan owns the real property in question and therefore appears to qualify for the limited exception under Regulation 18702.4(b)(1), pursuant to Regulation 18702.5(d)(3) she may speak as a member of the public so long as she complies with the rules located in Regulation 18702.5(b)(1) and (b)(2). A copy of Regulation 18702.5 is enclosed. We assume this adequately responds to your third question.

Additionally, real property is directly involved in a governmental decision if the “decision involves the zoning or rezoning,³ annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property.”⁴ (Regulation 18704.2(a)(2).)

However, real property is only indirectly involved if “[t]he decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category.” (Regulation 18704.2(b)(1).)

Accordingly, the determination as to whether Supervisor Brennan's real property is directly involved in the decision, or meets the exception under Regulation 18704.2(b)(1) and is indirectly involved, is dependent on whether the proposed amendments to the Ag Element are “applicable to all other properties designated in that category.” (See *Barker Advice Letter*, No. A-03-028.) Although you have not presented information regarding the specific zoning categories affected, you stated that the amendment to Policy 11.A.2 would exempt only infill parcels and smaller agricultural parcels located adjacent to urban land use designations and within proximity of a public water main, thereby directly affecting approximately 2,476 acres of agricultural land, including Supervisor Brennan’s real property.

Therefore, it does not appear that the amendment is applicable to all properties in a particular zoning category (e.g., smaller agricultural parcels located adjacent to urban land use designations and *not* within proximity of a public water main), and Supervisor Brennan’s real property would thus not fall within this exception. Accordingly, her real property would be directly involved in the governmental decision.

Step Five: What is the applicable materiality standard?

Regulation 18705.2(a)(1) provides the materiality standard for *directly* involved real property as follows:

“The financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.” (Emphasis added.)

³ “Zoning” and “rezoning” refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest. (Regulation 18704.2(a)(2).)

⁴ Regulation 18704.2 specifies other circumstances under which real property is either directly or indirectly involved in a governmental decision. These other circumstances do not appear to be applicable to Supervisor Brennan’s situation based on the facts you've provided.

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is commonly referred to as the “one penny rule.” In order to rebut this presumption, it is necessary to establish that the decision would not even affect the property's value by one cent.

Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision on Supervisor Brennan’s economic interest will meet the applicable materiality standard?

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. For a material financial effect to be foreseeable on an official’s economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

You stated that Supervisor Brennan's real property is currently subject to a Williamson Act⁵ contract that is in the rolling 10 year portion of its term, and no notice of non-renewal is in effect. You also indicated that the proposed amendment to Policy 11.A.2 in the Ag Element would allow smaller parcels of land, such as the one owned by Supervisor Brennan, to be more readily developed. Notwithstanding the fact that her real property is currently subject to a Williamson Act contract, such potential for development would increase its value, and therefore have a reasonably foreseeable financial effect on her real property. Accordingly, Supervisor Brennan has a conflict of interest that would prevent her from participating in the governmental decision.⁶

Steps Seven and Eight: Public generally & legally required participation.

You have not presented any facts indicating that either the “public generally” or “legally required participation” exceptions would apply. Accordingly, we have not provided an analysis involving those steps.

QUESTION TWO

Can the governmental decision be bifurcated?

Your second question asks if the County action regarding the proposed revisions to the Ag Element can be bifurcated so that Supervisor Brennan can vote on those decisions in which

⁵ Enacted originally as the California Land Conservation Act of 1965, the Williamson Act's primary goal is to preserve farmland and open space. (See *Shellenberger v. Bd. of Equalization* (1983) 147 Cal.App.3d 510, 513.) As we understand it, the contracts are entered for a rolling 10-year term (i.e., unless either party files a notice of nonrenewal, the contract is automatically renewed for an additional year). (Gov. Code, § 51244.)

⁶ We reach the same conclusion regardless of whether the restriction against development of her real property under the Williamson Act contract continues, as you believe, until ten years elapses from the time she provides a notice of nonrenewal.

she has no disqualifying financial interest. Regulation 18709(a) sets forth the requirements for segmentation of a decision:

“An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.”

Subdivision (b) of Regulation 18709 further states that “decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Although you indicated in our phone conversation that you believed the decision concerning Policy 11.A.2 was not so interrelated with the remaining proposed revisions to the Ag Element such that Supervisor Brennan could not vote on them, you have not provided sufficient information for us to make that determination.⁷ In the past, the Commission has advised that some decisions may be too interrelated to be considered separately. For example, if the resolution of one decision will effectively determine the result of the other decision, the decisions may not be segmented. (See generally *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, A-05; *Hull* Advice Letter, No. A-04-052.)

If you have additional facts you would like us to consider to assist you in making this determination, please feel free to seek supplemental advice regarding your question.

⁷ This includes the revisions referenced in your letter to Goal 11.A and Policy 11.A.1 of the Ag Element.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Counsel, Legal Division

JW:jgl

Enclosure